

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H" :MUMBAI

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITA.No.1173/Mum./2022
Assessment Year 2017-18

M/s Sai Shirdi Constructions 429, Arenja Corner, Sector-17, Vashi, New Mumbai.	vs.	Pr. Commissioner of Income Tax-27, Mumbai.
(Appellant)		(Respondent)

PAN No. ABFFS1404G

For Assessee :	Ms. Rutuja Pawar/ HetalLaghare
For Revenue :	Shri Vinay Sinha, CIT-DR

Date of Hearing :	03.08.2022
Date of Pronouncement :	05.08.2022

ORDER

PER ANIKESH BANERJEE, J.M.

The instant appeal was filed by the Assessee against the order of the Learned Principal Commissioner of Income Tax, Mumbai-27 (In Short "PCIT") DIN & Order No. ITBA/REV/F/REW5/2021-22/1041888988(1), order passed

U/s 263 of the Income Tax Act, 1963(In short “Act”), dated 29.03.2022 for the assessment year 2017-18. The impugned order was generated from the order of the learned Assistant Commissioner of Income Tax, Circle-28(3)/Mumbai, order passed u/s 143(3) dated 16.12.2019.

2. Brief fact of the case is that the assessment was completed for the assessment year 2017-18 u/s 143(3) of the Act. The Ld. PCIT issued notice u/s 263 for not declaring of deemed rent in the return of income and ld. A.O. erroneously passed the order without considering the same. The assessee declared a rental income for renting out of show room of Rs. 68,70,528/- {before deduction of 24(a)} in the total income of the assessee and the income was assessed accordingly. According to Ld. PCIT the unsold property which was held in the stock in trade of the assessee had not declared the deeming rent U/s 23 in total income during filing of the return. The Ld. PCIT sought to consider deemed rent @ 8% of Rs. 3,52,49,944/- on closing stock of flats which worked out to Rs. 28,19,995/-. According to Ld. PCIT to Ld. AO did not take cognizance on

this issue in the order U/s 143(3) of the Act. Accordingly, the order of the ld. AO was set aside by the ld. PCIT treating it as erroneous & prejudicial to the interest of revenue. Being aggrieved, the assessee filed an appeal before us.

3. The learned counsel filed a paper book which is containing from page no. 1 to 32 which is kept in record. The learned counsel first pointed out that the Ld. PCIT issued notice for hearing on 04.03.2022 and calculated the annual rent on the closing stock of house property amounting to Rs. 28,19,995/-. The copy of the notice is annexed in page no. 8-9 of the paper book. In reply of this notice, the assessee filed a submission which is annexed in page No. 10-11 of the paper book and reply that the assessee declared rent u/s 24(a) amounting to Rs. 68,70,528/- in the return of income as rental income and mentioned that the assessee declared the rent which is higher the rent of Rs. 28,19,995/- proposed to be considered by Ld. PCIT . After this reply, the Ld. PCIT issued another notice dated 15.03.2022 which is annexed in page No. 12-13 of the paper book and he asked for the deemed

rent of the property on closing stock of the house property. Against this notice the assessee had made submission dated 17.03.2022 and replied that this deemed rent u/s 23(5) is not applicable for the assessment year 2017-18 as the said section 23(5) of the Act has been inserted by Finance Act, 2017 w.e.f. 01.04.2018. In this respect, the learned counsel of the assessee relied on the order of the Coordinate Bench of ITAT in the case of Tata Housing Development Company Limited vs. PCIT -8, Mumbai in ITA No. 3492 & 3493/MUM/2019 dated 28.09.2020. Accordingly, Section 263 of the Act is not applicable for the assessee.

3.1 Third notice was issued on 17.03.2022 u/s 263 by the Ld. PCIT mentioning that the last show cause notice there was typographical mistake and section 23(5) should be read as 23(1) of the Act and sought to consider rental income addition accordingly. The assessee had further rebutted the said notice and filed an explanation on 22.03.2022 by written submission and further informed that the rental income was declared in the return of income and submitted

that rental income has become correctly offered on closing stock and interest as per the Act.

3.2 The learned counsel further argued that the order passed by the ld. A.O. is not erroneous and not prejudicial to the interest of the Revenue. The learned counsel further mentioned in para -10 of the order U/s 263 which is extracted as below:-

“10. As while making the assessment u/s 143(3) for the Assessment Year 2017-18 (Assessment order dated 16.12.2019) the AO has failed to tax the annual value of the property forming part of the closing stock, under the head "Income from House Property", therefore, it is held that the Assessment Order passed by the A.O. u/s 143(3) on 16.12.2019 is erroneous in so far as it is prejudicial to the interest of the revenue. Hence, the assessment order dated 16.12.2019 passed by the A.O. is set aside to the A.O. with the direction to make a fresh assessment by taxing the annual value of the property forming part of the closing stock, under the head "Income from House Property". The annual value shall be computed as per the provision of section 23(1)(a) and deduction if any admissible under section 24 shall also be allowed while computing the income from house property. Before making the assessment, reasonable opportunity of being heard shall be allowed to the assessee by the AO.”

4. The ld. DR vehemently argued and relied on the order of the Ld. PCIT. No other contrary submission was made by the ld. DR against the submission of the assessee.

5. We heard the rival submission of both parties and considered the documents available in the record. The Ld. PCIT during the proceedings u/s 263 of the Act had issued multiple notice to prove the order of the Ld. A.O. as erroneous. It is clear that section 23(5) of the Act is not applicable for the assessee for this assessment year. The assessee explained and replied to the revenue about the issues in response to the notices of the Ld. PCIT. The formation of the opinion and belief of the Ld. PCIT was changing time to time after receiving reply of the assessee. We may also like to add here that section 23(5) of the Act has been inserted by the Finance Act, 2017 w.e.f. 01.04.2018 whereby notional annual value of the property held as stock in trade is sought to be brought to tax. The said amendment is only prospective in application. The Ld. PCIT in his third show cause notice had sought to consider the taxability of deemed rental income not u/s 23(5) but u/s

23(1)(a) of the Act. The assessee had duly submitted that rental income has been correctly offered in return of income amounting to Rs. 68,70,528/-. The Ld. PCIT has not brought with cogent evidence on record as to how the submission made by the assessee is incorrect. All facts & submission with regard to offer of rental income is already on record before the Ld. PCIT. Nothing prevented the Ld. PCIT to just verify those facts which are staring on him, before invoking his revisionary jurisdiction u/s 263 of the Act. Hence, we hold that order of the Ld. A.O. is neither erroneous nor prejudicial to the interest of the Revenue and hence, Ld. PCIT action u/s 263 of the Act is beyond jurisdiction and the same order is quashed.

6. In the result, the appeal of the assessee bearing No. 1173/Mum/2022 is allowed.

Order pronounced in the open Court on 05.08.2022.

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(ANIKESH BANERJEE)
JUDICIAL MEMBER

Mumbai, Dated 5th August, 2022

Santosh/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'E' Bench, Mumbai
6.	Guard File.

// By Order //

Assistant Registrar : ITAT Delhi Benches : Mumbai

Sl.No.	Particulars	Date	
1.	Date of Dictation	04.0822	Sr. P.S.
2.	Date of draft order placed before the Hon'ble	05.08.2022	Sr. P.S.

	Member		
3.	Date of draft order approved by the Hon'ble Second Member		JM/AM
4.	Date of receipt of approved draft order		Sr. P.S.
5.	Date of pronouncement		Sr. P.S.
6.	Order uploaded on the website of the Tribunal		Sr. P.S.
7.	Order sent to Bench clerk		Sr. P.S.
8.	Order signed by the Head Clerk		
9.	Order Signed by Asst. Registrar		
10.	Date of Dispatch of order		